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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 525

STANLEY R. HEMPHILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI,
to the United States Circuit Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF

MELVILLE MONHEIMER,
Seattle, Washington,
Attorney for Petitioner.

SUBJECT INDEX

Petition for Writ of Certiorari

	Pages
Certificate of Counsel	12
Errors Relied Upon	11
Jurisdiction to Grant Writ	10
Summary Statement	6

Brief in Support of Petition for Writ of Certiorari

Opinion Below	13
Statement of the Case	14
First Error Relied Upon	14
Second Error Relied Upon	14
Third Error Relied Upon	15
Fourth Error Relied Upon	16

Table of Authorities Cited

Section 338, Title 18, U. S. C. A.	10
Judicial Code, 240 (a), 43 Stats. 938; 28 U. S. C. A. Sec. 347	11
Rule 38, Section 4, sub-division (b), Rules of the Supreme Court	11

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To the Honorable the Supreme Court of the United States and to the Honorable Justices thereof:

Stanley R. Hemphill respectfully petitions the Honorable the Supreme Court of the United States and the Honorable Justices thereof for a Writ of Certiorari to review the final judgment of the Circuit Court of Appeals for the Ninth Circuit in cause Number 9056, entered June 3, 1941, affirming the judgment of his conviction by the United States District Court for the Western District of Washington, Northern Division.

120 F2d 115 in which it said that as a matter of fact the sufficiency of the evidence had been given consideration in its former opinion (112 F2d 505) but stated that it had declined to discuss the merits of the question of the sufficiency of the evidence because it did not feel privileged so to do and then proceeded to conform with the specific directions of this court and reexamine the testimony and exhibits to determine whether the evidence was sufficient to support the verdict.

The opinion recites certain isolated facts which are just as consistent with innocence as they are with guilt and then concludes that the evidence must be viewed in every possible light favorable to the Government and says that so viewed it is sufficient to support the verdict without in the opinion pointing out wherein the facts support the evidence or wherein the facts are consistent with guilt and inconsistent with innocence.

JURISDICTION TO GRANT WRIT

Defendant was convicted in the United States District Court of violation of Section 338, Title 18 U. S. C. A.

He appealed from this conviction to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court affirmed the judgment of conviction on June 3, 1940, and denied defendant's petition for rehearing on July 25, 1940.

Certiorari was granted by this, the Supreme Court, and the decision was reviewed and remanded by this court on March 3, 1941, 85 L. Ed. 641, and the Circuit Court rendered its subsequent opinion on June 3, 1941 and petition for rehearing was denied July 17, 1941.

This court has jurisdiction to review the judgments of the Circuit Court of Appeals (Judicial Code, 240 (a), 43 Stats. 938; 28 U. S. C. A., Sec. 347.)

Petitioner believes that his case comes under rule 38, Section 5, sub-division (b) of the Rules of the Supreme Court.

ERRORS RELIED UPON

Defendant contends that:

1. The evidence was insufficient to prove the commission of any crime.

2. Under the local practice it was reversible error for the district attorney, in questioning a character witness, to infer that the witness while acting as attorney for the defendant on trial had theretofore advised the defendant to plead guilty. Defendant contends that a reading of said cross-examination will disclose that the purpose of said questions was to prejudice the jury against the defendant by implanting in their minds the thought that the witness had in fact advised the defendant to plead guilty, even though the witness denied having so advised him.

3. It was prejudicial error to permit the witness, Colhour, to testify to facts inferring that the defend-

ant had stolen a typewriter and that his objection thereto made after the question was answered should have been and should now be considered as a motion to strike the testimony.

4. That the facts recited in the opinion of the Circuit Court as having been proven by the evidence and exhibits are all consistent with innocence and not inconsistent with guilt, and therefore the Court erroneously concluded that the facts as recited proved the commission of a crime.

Dated, Seattle, Washington, August 14, 1941.

MELVILLE MONHEIMER,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Seattle, Washington, August 14, 1941.

MELVILLE MONHEIMER,
Attorney for Petitioner.

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I

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered, entered and filed on June 3, 1941.

This opinion was rendered after a reversal by this, the Supreme Court, rendered March 3, 1941 of a prior decision in this cause of said Ninth Circuit rendered, entered and filed June 3, 1940, 112 F2d 505.

II

STATEMENT OF THE CASE

The foregoing petition contains a concise statement of the grounds on which the jurisdiction of this court is invoked and a statement of the questions presented and a specification of the four errors intended to be urged and, therefore, the same will not be repeated in this brief.

III

FIRST ERROR RELIED UPON

The Bill of Exceptions contained in the transcript of the record filed in the Circuit Court of Appeals and certified transcript which has been filed in this Court contains all of the evidence introduced in the case.

If, as a matter of fact as contended by the defendant, the evidence was not sufficient to prove any crime it seems to us that it would shock the sense of justice of any Court to permit the defendant to be committed to the penitentiary. Courts have often said that the parties cannot, by stipulation, give the court jurisdiction when none in fact exists and we think here that the record should be examined to determine whether or not facts sufficient to constitute a crime were proven.

SECOND ERROR RELIED UPON

The Circuit Court in its opinion made reference to the questions propounded by the District Attorney in the cross-examination of John J. Sullivan as to

whether or not the witness, John J. Sullivan, had advised the defendant to plead guilty, had this to say upon page four of the opinion of June 3, 1940:

> "True, we have the right under our rules, should we choose to exercise it, to notice plain error, unassigned or unnoticed in the trial court, to prevent a miscarriage of justice in an exceptional case, where the error is particularly harmful. But that is not the case here. While we think the harm done by the question was mitigated by the answer and that no prejudice appears sufficient to warrant a reversal, nevertheless we do not wish to be understood as approving the question. It went beyond the subject matter of the direct examination and s h o u l d not have been asked."

From the foregoing it will be seen that the Court disapproved the question but declined to find prejudicial error and reverse the case.

We think an intimation by the district attorney that defendant's own counsel had advised him to plead guilty would so prejudice the jury against him that he could not have a fair trial.

THIRD ERROR RELIED UPON

The following excerpt is from page five of the opinion of June 3, 1940:

"Q. What did you say?

A. I asked him if he sold my typewriter.

MR. MIRACLE (counsel for Hemphill): I object to it as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. MIRACLE: Exception.

THE COURT: Exception allowed.

Q. What did he say, Mr. Colhour?

A. He informed me he didn't know where it was, that he had one missing himself.

Q. Did you ever get it back? A. No."

> "The only objection made to any of this line of testimony was interposed *after a* question was *answered.* An exception was taken; but there was no motion to strike."

We think the Court placed form over substance. Manifestly it was improper for the assistant District Attorney to introduce evidence of the commission of an independent crime by the defendant. The object and purpose must have been to prejudice the jury against the defendant and lead them into a frame of mind that they would convict the defendant in the case at bar although the evidence was insufficient, because they thought he committed other crimes.

FOURTH ERROR RELIED UPON

The practice of law enforcement by Writs was exclusive at one time in common law courts and may have been sufficient for the needs of that day but we are all prone to believe that when a wrong was committed it was better to describe the wrong in plain language than to refer to it as a writ of trespass or trespass on the case, etc. We say progress has been made when the language of the Court can be understood by the man on the street. It is the practice in

every jurisdiction in this country to have the decisions of the Supreme Court in writing so that they can be read and that the litigants and other parties in interest may know just what the Court did decide.

It is our contention that the opinion of the Circuit Court of Appeals for the N i n t h Circuit here sought to be reviewed, although it recites certain facts about equipment and about the cost of pamphlets studied by the students and that students were required to pay $5.00 and $10.00 per month, it does not analyze the evidence and exhibits and point out just how the unrelated facts go to prove the commission of a crime. It is the nearly universal practice for petitions for rehearing to be simply denied without opinion but the presentation to a court on an appeal from a trial on the merits we think requires an opinion which shows wherein the facts go to prove the commission of the offense charged.

Respectively submitted,

MELVILLE MONHEIMER,

Attorney for Petitioner.

Due service and receipt of a copy of the within is hereby admitted this.....day of..... 1941.

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United States Attorney

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Assistant United States Attorney,

Attorneys for Respondent.